

WEST VIRGINIA NORTHERN FEDERAL DEFENDER QUARTERLY

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NEW CASE COMPENSATION MAXIMUMS UNDER CJA

Passage of the fiscal year 2005 federal appropriations bill included an amendment to 18 U.S.C. §3006A that raises the case compensation maximums for both appointed counsel and providers of investigative, expert and other services. The old and new maximums for appointed counsel are:

- felony cases, from \$5,200 to **\$7,000**;
- appeals, from \$3,700 to **\$5,000**;
- parole cases, from \$1,200 to **\$1,500**;
- parole appeals, from \$3,900 to **\$5,000** and
- for any other representation, i.e.

misdemeanor cases and supervised release violations, from \$1,200 to **\$1,500**.

As was the earlier practice, appointed counsel may not exceed these case maximums unless written justification is both provided to the district court and later approved by the Fourth Circuit Court of Appeals. The operative date for these new rates is **December 8, 2004**. Any case that includes compensable work performed *on or after* the operative date uses the new rates. For those cases fully completed before the operative date, the old rates apply. The hourly rate of \$90 for work performed still applies. However, the hourly rate for death penalty defense under the CJA will increase from \$125 per hour to **\$160** per hour, effective April 1, 2005.

In addition, the cost ceilings for providers of investigative, expert and other services have increased as well. CJA Counsel may obtain

such services without prior authorization as long as the total cost of services obtained, without prior authorization, does not exceed **\$500**. The old rate was \$300. The maximum amounts payable for such services with prior judicial approval increased from \$1,000 to **\$1,600**. The same operative date of **December 8, 2004** applies. Any services provided on or after that date employ the new rates.

Please call the Federal Public Defender Office at (304) 622-3823 if you have any questions about the new case compensation maximums under the Criminal Justice Act.

2005 CJA APPROPRIATIONS

The final appropriations for Defender Services provided an 11% increase above fiscal year 2004. This amount is still \$6.0 million below anticipated requirements. The final plan reduces funding for Federal Defender Organizations by \$3.5 million and for panel attorneys by \$2.5 million from full requirements to make up this shortfall.

According to data maintained by Defender Services, CJA panel attorney payments averaged about \$1.0 million per day in 2004. 10% of the CJA panel attorney cases ("mega-cases") in 2004 accounted for 57% of the annual CJA payments to panel attorneys.

BOOKER/FANFAN UPDATE

The 2004 session of the U.S. Supreme Court closed without any ruling on the applicability of Blakely v. Washington to the Federal Sentencing Guidelines. We will have to wait until at least January 10, 2005 to hear the finale of the Booker and Fanfan cases.

The Federal Public Defender Office for the Northern District of West Virginia will work in conjunction with the Training Branch of the Office of Defender Services to provide immediate updates to the panel once the Court finally rules on these important issues.

AMENDMENTS TO UNITED STATES SENTENCING GUIDELINES, EFFECTIVE NOVEMBER 1, 2004

The Good (Decreases):

- **§2A2.2** - Base offense level for aggravated assault will be decreased from offense level 15 to offense level 14.
- **§2D1.1** - New amendment makes clear that the court shall exclude from the offense level determination the amount of controlled substance, if any, that the defendant establishes that he did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, regardless of whether the defendant agreed to be the seller or buyer of these controlled substances. The new amendment applies in those cases where a defendant “puffs” his real ability to access controlled substances.
- **§2D1.11** - Amendment uses a new method – similar to a “Role Cap” to address the overstatement of culpability in the drug guidelines for precursor chemicals. It reduces somewhat the effect of quantity on the offense level by giving greater consideration to the defendant’s role in the offense.

- **§4B1.4(b)(3)(A)** - The amendment eliminates a double-counting issue for defendants who face conviction for both a violation of 18 U.S.C. §924(c) and 18 U.S.C. §922(g) and meet the requirements for enhanced punishment under the Armed Career Criminal Act, 18 U.S.C. §924(e).

The Bad (Increases):

Homicide, Manslaughter & Assault - The base offense level for all these guidelines was increased and other enhancements added or existing ones increased under **§2A1.1 through §2A1.5, and §2A2.1 through §2A2.4**

Child Pornography & Sexual Abuse Offenses - This amendment implements a number of directives in the PROTECT Act, including increasing base offense levels to correspond to new or increased statutory mandatory minimum and maximum penalties; it affects **§2A3.1-.4; §2G1.1; §2G1.3; §2G2.1 and §2G2.2; §2G3.1; §3D1.2**, and conditions of probation and supervised release found under **§5B1.3; §5D1.2; §5D1.3; §7B1.3**.

CAN-SPAM Offenses - **§2B1.1** - Creates new adjustments for felonies under the Controlling the Assault of Non-Solicited Pornography and Marketing Act.

Public Corruption - **§2C1.1; §2C1.2** - Increases the punishment for bribery, gratuity and “honest services” cases.

Drug Offenses - **§2D1.1; §2D1.11; 2D1.12** - Adds a “special instruction” directing application of vulnerable victim adjustment if defendant commits a sexual offense by distributing a controlled substance; adds a two level increase for mass marketing;

provides a uniform mechanism for determining sentences in cases involving drug analogues; and adds white phosphorus and hypophosphorous acid to the Chemical Quantity Table.

MANPADS & Explosive Devices - §2K2.1

- Provides steep increase of 15 level if destructive device involved a portable air defense system, portable rocket or missile, and eliminates the cumulative specific offense characteristic offense level cap of 29 levels for these types of destructive devices.

Body Armor - §2K2.6 - Creates new guideline for new offense which prohibits possession of body armor by individuals who have been convicted of a felony.

Immigration Offenses - §2L2.2(b) -

Provides a new 4-level upward adjustment if defendant fraudulently obtained or used a United States passport. Upward departure invited if passport used with intent to engage in terrorist activity.

Hazardous Materials - §2Q1.2 - Adds a 2-level increase if the offense involves a conviction for transporting hazardous materials under 49 U.S.C. §5124, and also adds an upward departure if the defendant had a terrorist motive or if the offense resulted in extreme psychological injury.

DIGITAL PHOTO/VIDEO PHONE PROHIBITION IN COURTHOUSES

Until further notice, the Court has issued a directive that prohibits counsel from entering the U.S. Courthouse with any cellular telephone that has digital photo or video camera capabilities. Counsel will be asked by the Court Security Officers to check such phones at the security check-

point.

CIVILIAN CLOTHES FOR DEFENDANTS AT TRIAL

Chapter 7 of the *Guide to Judiciary Policies and Procedures* prohibits a Defender Office or Panel Attorney from expending CJA funds for the purchase of civilian clothes to be used by a defendant at trial so as to avoid appearing before the jury in prison attire.

The Federal Public Defender Office has collected and sorted outfits by size, including two-piece suits, dress pants and dress shirts, and shoes. If a CJA Panel Attorney represents a defendant who lacks family support or is otherwise unable to obtain civilian clothes for trial, please call the Defender Office at (304) 622-3823. Donations of clothing for male and female defendants will gladly be accepted.

FREE COMPUTER ASSISTED LEGAL RESEARCH

The Office of Defender Services recently reached an agreement with Westlaw and Lexis whereby one annual fee is centrally paid so that each Federal Defender Office can have unlimited access to computer assisted legal research. CJA Attorneys here in the district are invited to contact the Defender Office to use Westlaw and Lexis for case-related research at no cost. This service also includes access to ChoicePoint and AutoTrac, investigative search tools used to locate witness related information.

METHADONE TREATMENT AND SAFE DOSAGE REDUCTION BEFORE SENTENCING

It has become much more common to

represent defendants who are actively involved in a methadone treatment program during the pendency of a federal criminal case. However, the treatment program's goal of long-term methadone use for patient stability and opiate craving control is oftentimes incompatible with the time schedules encountered in a federal criminal case.

The Federal Bureau of Prisons will not prescribe methadone to an inmate who begins serving a federal sentence, with the exception of a pregnant woman who can document prior methadone use. Further, it may be detrimental to an individual's health to go quickly from a normal daily methadone dosage of between 90 to 160 mg's to nothing upon incarceration.

Most federal criminal cases last between four to six months. According to health experts, a decrease in methadone of 3 to 5 mg's per week is considered medically safe, and it will avoid major opiate cravings.

Two area methadone treatment clinics are listed below, and defense counsel should work closely with the defendant and the treating methadone clinic to insure a safe reduction in dosages while the criminal case is pending.

Clarksburg Treatment Center, Inc.
(304) 622-7511

The Martinsburg Institute
(304) 263-1101

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Pollard, 389 F.3d 101 (4th Cir. 2004).

- Sentence of probation, rather than suspended sentence, does not violate Alabama v. Shelton requirement that defendant have appointed counsel before court accepts guilty plea.

United States v. Turner, 389 F.3d 111 (4th Cir. 2004).

- Court refuses to require per se rule disqualifying from jury service depositors of a robbed bank.

United States v. Bundy, WL 2914107 (12/17/04).

- Valid conditional guilty plea preserves for appellate review only "case-dispositive" pre-trial issues.

- Issue is case-dispositive if: 1) a ruling in defendant's favor would require dismissal of charges or suppression of material evidence, or 2) a ruling in government's favor would require affirming the conviction.

United States v. Perez, WL 2998770 (12/29/04).

- Very detailed analysis of Leon good-faith exception to warrant requirement.

- Court overturns finding affidavit in support of search warrant was "bare-boned."

United States v. Douglas L. Johnson, __ F.3d __ (4th Cir. 2004)(12/29/04).

- After government files downward departure motion pursuant to 18 U.S.C. §3553(3), district court may impose a sentence below guideline range even though defendant is subject to statutory minimum sentence that exceeds guideline range.